Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970.

PAUL CHAPLIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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AUTHORITIES CITED.

	Page
Brinegar v. United States, 388 U. S. 160	8
Carroll v. United States, 267 U. S. 132	10, 11
DiRe v. United States, 331 U. S. 581	8, 10
Dumbra v. United States, 268 U. S. 435	8
Johnson v. United States, 273 U. S. 28	8
Nathanson v. United States, 290 U. S. 41	8
People v. Haven, 381 P. 2d 927	9
Preston v. United States, 376 U. S. 364	11
Staples v. United States, 320 F. 2d 817	8
Steele v. United States, 267 U. S. 498	8
United States v. Evans, 194 Fed. Supp. 90	10
United States v. Harris, 321 F. 2d 739	10
United States v. Rabinowitz, 339 U. S. 56	11
United States v. Robinson, 325 F. 2d 391	11
United States v. Smalls, 223 Fed. Supp. 387	11

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, Paul Chaplin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-captioned case on May 21, 1970.

Citations to Opinion Below.

Appended hereto, and printed herein as Appendix A, is the opinion rendered by the court below.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 21, 1970. The jurisdiction of this Court is invoked under Title 28 of the United States Code, §1254(1).

Questions Presented.

(1) Can a warrantless arrest and an alleged incidental search based thereon be sustained in the absence and probable and/or reasonable cause?

(2) Can a warrantless search of an automobile, after the removal of its sole occupant, and after the Government has taken permanent and total dominion over the motor vehicle, be sustained?

(3) Should a defendant be denied a plenary hearing on a motion to suppress made at the trial, when a motion to suppress, timely made before another judge, was "denied without prejudice with leave to renew at the trial"?

Statutes Involved.

Title 21, United States Code, §173, provides:

> §173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.
>
> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to

its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, § 174, provides:

"§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Table of Contents.

	Page
ations to Opinion Below	1
isdiction	1
stions Presented	1
utes Involved	2
Involved	4
ement	4
Evidence	5
sons for Granting the Writ	7
pendix A—Opinion of the Court Below	14
pendix B—Order Extending Time	17
STATUTES.	
.S.C. §173	2
.S.C. §174	3
RULES.	

Rule Involved.

Federal Rules of Criminal Procedure, Rule 41(e).

Rule 41. *Search and Seizure.*

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement.

The petitioner was indicted in the Southern District of New York in one count for the violation of Title 21, United States Code, §§ 173, 174. He was tried without a jury and convicted by the district judge presiding.

Prior to trial and timely petitioner moved to suppress the evidence, herein, before a district judge other than

the trial judge. After a hearing, the hearing judge denied the motion to suppress, "without prejudice and with leave to renew on the trial."

On the eve of trial, at a pre-trial conference, counsel for the petitioner expressed his intention to renew his motion to suppress, requesting that it be heard *de novo*, in accordance with the memorandum decision of the hearing judge. The trial judge expressed the view that the denial "without prejudice" was a denial on the merits and that he, the trial judge, had neither the right nor inclination to sit in appellate review on his brother judge. Exception was properly taken. A witness not available to the petitioner was produced at the trial's outset, and the trial judge, having heard that witness, ruled that the testimony so produced was not sufficient to change his view about overruling his brother judge. The trial then proceeded to conviction.

The Evidence.

John O'Brien, a federal narcotics agent, was the only witness to testify on the petitioner's motion to suppress. He stated that, as of the date of the arrest, he had been a narcotics agent for about two years. He had been working on an investigation of two brothers, Cooky Esposito and Johnny Esposito. He was surveilling them during the months of September and October, 1967. September 27, 1967, was the first date on which he had ever seen the petitioner herein. It was at a bar known as "Dugout Tavern" located on Astoria Boulevard, in Queens County, New York City. At that time, he observed petitioner and another male engaged in a conversation with the Esposito brothers and saw petitioner pass "a large sum of money," a "roll of bills about two inches or an inch and a half thick", to Cooky Esposito. He then followed Cooky and Johnny to a building on 78th Street,

Queens. He saw them enter a building there and emerge a short time later. They then drove to the vicinity of the Holiday Inn located at Grand Central Parkway in Queens, where they parked their car at the curb. He then saw petitioner and the other male drive up in a red Cadillac. Petitioner, who was driving, parked the car, alighted, and boarded the Esposito car briefly. When he alighted from the Esposito car, "he was supporting something under his jacket * * * with his left hand * * * you know, like walking with something in his hand, but in here somewheres (indicating) and that is all I saw. He got back into the Cadillac and drove off." Government agents attempted to follow the petitioner, but they could not catch up to him because he was going too fast.

The next time O'Brien saw the petitioner was on October 4, 1967, talking to the Espositos outside the "Dugout Tavern." It was then after 7:30 in the evening and he could not hear the conversation. Petitioner, then boarded a green car and drove off, followed by narcotics agents. They followed him into Manhattan, where petitioner left the car and was permitted to depart unmolested.

The next and crucial time that O'Brien saw petitioner was about nine o'clock in the evening on October 9, 1967. It was very dark at the time. The Espositos parked their car in 78th Street in Queens. At about 9:30 P.M., the Espositos drove to the Dugout Tavern. They parked their car on 90th Street and walked around the block where they met petitioner in front of the tavern where petitioner was seated in the red Cadillac. The Espositos boarded the Cadillac and they all rode to the parked Esposito car. One of the Esposito brothers, it was too dark to distinguish which one it was, boarded the Esposito car briefly and then returned to the Cadillac. He walked to the driver's side, remained a few seconds, and then the Cadillac drove off with only petitioner in it.

Petitioner drove off with no attempt at interception by the government agents. He drove at moderate speed and continued to 125th Street and Lexington Avenue in Manhattan, where O'Brien pulled the petitioner's car over and "placed Chaplin (petitioner) under arrest."

The Esposito brothers were never charged, never arrested, never indicted and never tried. In fact, neither one of them had police records of any kind, and the investigation of them was dropped, never to be resumed.

At 125th Street and Lexington Avenue, in Manhattan, O'Brien forced petitioner's car to the curb. He walked over to the petitioner, identified himself, and then said: "You are under arrest. Get out of your car." Petitioner alighted at once. He was then and there searched for weapons and other contraband and none were found. He was then manacled, with his hands behind him, and he was placed in the back seat of the agents' car, where he remained until he was taken to the office of the Narcotics Bureau. From the moment he was removed from his car, he was never again permitted near it and he never saw it again to this very day. From that moment on, the government took full and complete dominion over the petitioner's car and has continued to exercise such dominion, uninterrupted, to this very day.

The foregoing comprises the sum and substance of all of the proof offered by the government against the petitioner.

Reasons for Granting the Writ.

The writ should be granted because:

(a) the Second Circuit has rendered a decision in direct conflict with the decisions of other courts of appeal on the same matter:

(b) the Second Circuit has decided a federal question or questions in a way in conflict with applicable decisions of this Court;

(c) in denying petitioner a new and plenary hearing on his motion to suppress, the Second Circuit has denied him the relief granted him by Rule 41(e) of the Federal Rules of Criminal Procedure, and, in so doing, have violated his right to due process as guaranteed to him by the Fourth and Fourteenth Amendments to the United States Constitution.

The Constitution commands that an arrest must be lawful. *Staples v. United States*, 320 F. 2d 817. Moreover, even if lawful, a warrantless arrest cannot be made, save upon probable cause. Unless both these prior conditions are first met, no so-called incidental search can qualify as being lawful or reasonable. Mere suspicion, no matter how strong, is nonetheless speculative and cannot be a substitute for probable cause as same is defined by this Court. *Brinegar v. United States*, 388 U. S. 160; *Johnson v. United States*, 273 U. S. 28; *DiRe v. United States*, 331 U. S. 581; *Dumbra v. United States*, 268 U. S. 435; *Steele v. United States*, 267 U. S. 498; *Nathanson v. United States*, 290 U. S. 41.

As was said in *DiRe, supra:*

> "A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

The government's proof, even if believed, falls far short of the minimum standards fixed by this Court for probable cause.

On September 17th, almost one month before the illegal activity charged to the petitioner, the government agent saw the petitioner pass a thick roll of bills, after which he was seen "supporting something under his

jacket." There was not a shred of evidence that contraband was involved in any of petitioner's actions. It has been held that the passing of money or slips or envelopes, or the observation of bulges in clothing may be as consistent with innocence as with guilt. *People v. Haven*, 381 P. 2d 927.

The next time petitioner was observed was on October 4th, at which time he was engaged in a conversation with the Esposito which could not be overheard. There was no observation of even a single suspicious act.

The next and last encounter the agents had with the petitioner was late in the evening on October 9th when it was too dark to distinguish identities. O'Brien, on cross examination, stated:

> Q. Now, you didn't see Cooky or Johnnie pass any package over to Chaplin? A. When, sir?
> Q. October 9th. A. No, sir. I did not.
>
> * * *
>
> Q. All that you observed was conversation, what appeared to be conversation among those parties? Is that right? A. At which time, sir?
> Q. October 9th. That is all I am interested in. A. Yes, sir. That is correct.
> Q. And they talked, and one got in the other's car and they rode around, and then they came back? Right? A. Essentially, yes, sir.
> Q. You saw nothing passed from one to the other either way, the Espositos to Chaplin, or vice versa on October 9th? Is that right? A. That is correct.
>
> * * *
>
> Q. Let me put it this way, Mr. O'Brien: if you had not found a package of narcotics in the car would you have let Chaplin go? A. No, sir.
> Q. You would have taken him downtown? A. Yes, sir.
> Q. Charged with what? A. I am sorry?
> Q. Charged with what? A. I couldn't charge him, sir.

Q. You would have taken him downtown? A. Yes, sir.

Q. He was under arrest? A. Yes, sir (Trial Transcript, pp. 67-71).

This testimony was startling in concept. Even absent contraband, the petitioner's arrest was going to stand, even though he could not be charged with anything! It was quite clear that, when the petitioner was arrested, it was not on probable cause, but rather because the agent was determined to arrest the petitioner regardless of anything; and it is equally clear that the only purpose for the arrest was to make the search, and such procedures contravene *DiRe v. United States, supra.* This lends credence to the petitioner's constant protestation that there never was any contraband in the car and that the heroin shown to petitioner for the first time at the Narcotics Bureau was heroin furnished by the agent himself as an aid to "frame" the petitioner.

When the Second Circuit affirmed the conviction, such affirmance was diametrically contrary to the principles laid down by this Court and followed by other circuits.

Assume, *arguendo*, that the arrest was lawful; nonetheless it cannot be argued that the search was incidental to a lawful arrest, since it contravened the law as exposed by this Court and by other circuits. As will be amply demonstrated, the agents were required, under the Fourth Amendment and the case law, to first obtain a warrant before a search could be conducted. The government argued that, because a moving vehicle was involved, an emergent situation existed and the search was justified under *Carroll v. United States*, 267 U. S. 132. It is well settled that, assuming the arrest to be good, if the only purpose in making the arrest was an excuse for making a search, a search warrant is an absolute requirement. *United States v. Harris*, 321 F. 2d 739; *United States v. Evans*, 194

Fed. Supp. 90; *United States v. Robinson*, 325 F. 2d 391; *United States v. Smalls*, 223 Fed. Supp. 387.

There is a more compelling reason why the search was invalid without a warrant. It was said by this Court, in *United States v. Rabinowitz*, 339 U. S. 56, that the only justification for the search of an automobile without a warrant is to:

(a) protect the arresting officer from possible harm;

(b) to deprive a lawfully arrested person of the potential and means for escape;

(c) and to avoid the destruction by the person arrested of the sought-after evidence.

By this standard, the warrantless search was not justified; for the petitioner had been forcibly removed from his car, immediately manacled, and placed in the rear seat of the agents' car, and forever removed from contact with his own automobile. He had been personally searched and no weapons or other contraband were found, and he was forcibly prevented from ever going near his own car for a weapon, assuming there was one in his car. He certainly could not have escaped in his car, since he was safely stowed away in the agents' car. He couldn't destroy the evidence, as he never was able to get to his car to do so, had he been so inclined. The car could have been searched by the agents at their leisure and, as was said in *Carroll v. United States*, *supra*:

> "In cases where the securing of a warrant is reasonably practicable, it must be used * * *."

Preston v. United States, 376 U. S. 364, totally circumscribed *Carroll* and made the ruling in *Rabinowitz* even more definitive. There, Mr. Justice Hugo Black said:

> "Our cases make it clear that the searches of motor cars must meet the test of reasonableness

under the Fourth Amendment before evidence obtained as a result of such searches is admissible.

* * *

"It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the *person of the accused* for weapons or for the fruits of or implements used to commit the crime * * * This right to search and seize without a search warrant *extends to things under the accused's immediate control* * * *." (Italics supplied.)

Assume, *arguendo*, no quarrel with the search of the petitioner's person. Certainly, the motor vehicle had been forever lost to the petitioner's control at the time the search is claimed to have been made, and, under the principle enunciated in *Preston*, the search was absolutely void and unlawful absent a search warrant.

The Second Circuit went contra to this Court and other circuits both with respect to the use of the arrest merely as a device and with respect to the obtaining of a search warrant for the searching of property over which they had permanent and complete control.

The refusal to grant a plenary suppression hearing after a denial of a motion to suppress "without prejudice and with leave to renew at the trial" does violence to due process in that the petitioner never had a determination on the merits on his motion. It was tantamount to a complete denial of a right to test the legality of the search. This denial violated utterly his rights under the Fourth Amendment, rights which have been zealously guarded by this Court. In ratifying such a bizarre result, the Second Circuit simply ignored the Fourth Amendment in all of its implications.

For all of the reasons hereinbefore assigned, it would appear that certiorari is surely indicated here.

Respectfully submitted,

JACOB LEWIS GOLD,
Attorney for Petitioner.

SAMUEL W. GILMAN,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

No. 695—September Term, 1969.

(Argued April 16, 1970 Decided May 21, 1970.)

Docket No. 33182

UNITED STATES OF AMERICA,

Appellee,

against

PAUL CHAPLIN,

Appellant.

Before:

Waterman and Friendly, Circuit Judges, and Zampano, District Judge.*

Appeal from a judgment of conviction on one count of violating 21 U.S.C. §§ 173, 174, after a non-jury trial in the United States District Court for the Southern District of New York, Marvin E. Frankel, Judge. Affirmed.

Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Peter L. Truebner and Jack Kaplan, Assistant United States Attorneys, of counsel, for Appellee.

Samuel W. Gilman, 401 Broadway, New York, N. Y., for Appellant.

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*Of the District of Connecticut, sitting by designation.

PER CURIAM:

Following a non-jury trial before Judge Marvin E. Frankel in the United States District Court for the Southern District of New York, appellant Paul Chaplin was convicted of the unlawful receipt and concealment of approximately 100 grams of heroin. 21 U.S.C. §§ 173, 174. We affirm the judgment.

Appellant first contends there was no probable cause for his arrest. At appellant's pretrial suppression hearing, agent O'Brien testified that surveillance prior to the arrest had revealed a pattern of clandestine meetings between appellant and two other narcotic suspects. On one occasion, Chaplin was seen to pass a large sum of money to the suspected narcotics traffickers; shortly thereafter the agent observed Chaplin emerge from the suspects' car supporting something under his jacket. On another occasion, Chaplin was a party to an incriminating conversation which was overheard by a federal agent. The vehicles used by the appellant in his dealings with these suspects were registered to known narcotic offenders. Finally, after observing the appellant's involvement in another similar transaction on October 9, 1967, the agents moved in and arrested Chaplin in his automobile. A search of the vehicle uncovered the heroin.

The appellant argues that had the search not disclosed the contraband, there would not have been sufficient evidence to sustain a conviction. While this may be true, the requirements of probable cause are not grounded on so rigid a test, but on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Much less evidence is necessary to constitute probable cause for arrest than is required to establish guilt. *Draper v. United States*, 358 U.S. 307, 311-312 (1959). We believe that under the circumstances here the officers reasonably determined that a violation

of the narcotics laws had occurred, cf. *Henry v. United States*, 361 U.S. 98, 104 (1959); probable cause, therefore, existed for Chaplin's arrest.

The appellant next asserts that, even assuming the arrest was valid, the officers were required first to obtain a warrant before they conducted a search of the vehicle. The claim is without merit. Since the search and seizure occurred in 1967, we need not consider whether the principles established in *Chimel v. California*, 395 U.S. 752 (1969) apply. See *United States v. Bennett*, 415 F. 2d 1113 (2 Cir. 1969). Pre-*Chimel* law clearly authorized the search of the appellant's automobile at the time and place of the arrest. *United States v. Rabinowitz*, 339 U. S. 56, 61 (1950); *United States v. Mazzochi*, —— F. 2d ——, Slip Op. p. 2181 (2 Cir. April 7, 1970); *United States v. Gorman*, 355 F. 2d 151, 154-155 (2 Cir. 1965), cert. denied, 384 U.S. 1024 (1966).

Appellant's final complaint is that Judge Croake's pretrial denial of his motion to suppress "without prejudice" entitled him to another plenary hearing before the trial judge. Upon counsel's renewal of the motion at trial, Judge Frankel permitted the appellant to present only the testimony of a witness who was unavailable at the time of the original hearing. This testimony was completely consistent with Judge Croake's pretrial disposition of the issues; the trial judge was not required to pursue the matter further. See Fed. R. Crim. P. 41(e); *United States v. Calotta*, 413 F. 2d 1343, 1345 (2 Cir. 1969).

Affirmed.

APPENDIX B.

Order Extending Time to File Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES.

No. .. October Term, 1969.

PAUL CHAPLIN,

Petitioner

v.

UNITED STATES.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 20th, 1970.

Dated this 18th day of June, 1970.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of
The United States